

RULES OF ENGAGEMENT – SOME BASIC QUESTIONS AND CURRENT ISSUES

Martin Faix

Abstract: In the context of military operations, the use of force is regulated primarily by Rules of Engagement (ROE). These delineate the amount, as well as the circumstances of and limitations on the use of force in a mission and thus provide operational guidance on how to accomplish the mission within the constraints of its legal and extralegal (diplomatic, policy, etc.) parameters. ROE must primarily make it possible to achieve the objectives of an operation and to protect the deployed forces. With the changing context of the use of force, it is becoming an ever greater challenge to develop, implement and use ROE in a manner that appropriately reflects current developments.

Resumé: V kontexte vojenských operácií je otázka použitia sily regulovaná predovšetkým prostredníctvom Pravidiel nasadenia (PN). Tieto definujú rozsah, intenzitu, ako aj podmienky a limity použitia sily. Poskytujú tým operatívny návod k realizácii misie v rámci jej právnych i mimoprávnych (diplomatických, politických, atď.) medzí. PN musia primárne umožniť dosiahnutie stanovených cieľov operácie a ochranu nasadených jednotiek. Zmeny kontextu nasadenia ozbrojenej sily v medzinárodnom spoločenstve majú však za následok, že tvorba, implementácia a použitie PN, ktoré by náležite odrážali súčasný vývoj, sa postupne stávajú stále väčšou výzvou.

Key words: use of force, rules of engagement, military operations, mandate, peacekeeping.

On the author: Ref.jur. Martin Faix, MJI, conducted his law studies at the University of Giessen Faculty of Law (Germany) and the Griffith University Faculty of Law in Brisbane (Australia). At the University of Giessen, he obtained in 2006 a Master's degree in law and in 2009 also a Master's degree in International Law (2009). Currently he lectures at the Palacký University in Olomouc and conducts PhD studies in International Law at the Charles University in Prague. He is a member of the Czech Society of International Law and the International Institute of Space Law, Paris. His research focuses on transition of legal systems of Central and Eastern European Countries, International Humanitarian Law and international law aspects of the European Union, especially aspects of the European Military Crisis Management.

1. Introduction

The use of force in international relations is a highly sensitive issue, regardless of the context in which it is used, and especially in situations that do not fall under the category of "self-defence". With the increasing use of operations other than war, e.g. UN peacekeeping operations, and as the quality of such operations has changed in recent decades, the use of force has become one of the most troubling issues faced by the international community. The amount and intensity of force

to be used in a particular operation is defined in the operation's mandate, but the specific rules for the use of force issued in written form for the deployed troops (and thus implementing the mandate) are the Rules of Engagement (ROE). This set of rules provides operational guidance on how to accomplish the mission within the constraints that international law imposes on the use of force in order to ensure compliance with international law. This fact demonstrates the immense practical importance of ROE for the daily reality of the international community. With the changing context of the use of force, the development, implementation and use of ROE becomes a challenging task. This seems to be a good reason to present some basic thoughts on ROE and some of the related current issues, which is the main goal of this contribution.

"Death by rules of engagement" was the title of a news story¹ concerning the death of an American soldier caused by the alleged *"inverted morality and insanity of U.S. military rules of engagement"*. This is only one of the stories in which the term "Rules of Engagement" (ROE) appears. More importantly, this complex issue has become the subject of harsh criticism from politicians, NGOs, the press or even individuals, just like in the case mentioned. This may not be all that surprising, considering the continual involvement of Europe in matters of international peace and security, the corresponding rise in the amount of global public scrutiny that armed interventions and peace-keeping operations are subjected to, and the instantaneous and ongoing media coverage of conflicts and crisis situations (the CNN-effect). Additionally, ROE are now being developed and used not only by the military but also by police forces, in maritime operations and even for private military contractors,² the involvement of which in peace operations is steadily increasing. At the same time, the "enemies" are also aware of the sensitivity of the ROE issue, which in some cases leads to the purposeful exploitation of ROE, as a recent statement of a US Army First Lieutenant fighting in Afghanistan demonstrates: *"We're facing a thinking enemy, they adapt to our tactics in order to counter them. They are very cynically taking advantage of our rules of engagement. We've seen them multiple times, fleeing the area with women and children as human shields. Their spotters frequently have kids on the backs of their mopeds to deter us from firing."*³ The concern that enemy forces could take advantage of knowing the limits and constraints encompassed in ROE is also the reason why states and organizations usually do not disclose them.⁴ Considering the foregoing

¹ See the full story by D. West "Death by rules of engagement" of 17 August 2007, available at: http://townhall.com/columnists/DianaWest/2007/08/17/death_by_rules_of_engagement.

² B. F. Klappe, International Peace Operations. In D. Fleck, *The Handbook of International Humanitarian Law*. Second edition. New York: Oxford University Press, 2008. pp. 635-675 [656] (in the following only, "B. F. Klappe, International Peace Operations").

³ For the whole story, see LCpl. Clarc, W. James, Fighting the Taliban With Brute Force. *Military.com* [online]. 02.02.2010, [cit. 2010-05-28]. Available at: <http://www.military.com/news/article/marine-corps-news/fighting-the-taliban-with-brute-force.html>.

⁴ This may be true for wartime, as disclosure of the ROE would run counter to the elementary principles of combat: deception and surprise (B. F. Klappe, *International Peace Operations*, p. 661). In peace sup-

developments, it may appear surprising that while the current issues relating to ROE have been taken up by journalists, the debate continues to be largely neglected by academia.

Extralegal factors (most notably political ones) also play a decisive role in the development, implementation and use of ROE. Consequently the issue is highly complex and may be looked at from a variety of viewpoints. This makes it necessary to specify the scope of this contribution. It shall first deal with the concept, purposes and context of ROE, with a focus on the aspects relevant for further analysis. In the second step, three aspects of the current ROE debate will be presented: (1) the impact which the changing context of the use of force in the international community has on ROE, (2) the question of whether, when, and for what reasons, ROE may be viewed as a hindrance to the effectiveness of operations, and (3) the implications of restrictive national parameters on ROE.

2. The Concept, Purposes and Context of ROE

2.1 *The concept and scope of Rules of Engagement*

Although ROE are in general not a new phenomenon,⁵ proper attention should be paid to their definition. It is interesting to note that when attempting to define ROE, authors dealing with this topic naturally tend to use the definition corresponding with the focus of their contribution, which may be on the multinational operations of international organizations as a whole (NATO, the UN, etc.) or on a particular national contingent contributing to such operation, or even on an operation conducted by a particular state. This, however, would be an oversimplification: As Dreist states,⁶ when one takes a closer look at the details of the ROE-systems of NATO, the EU or the UN, essential differences will become apparent; moreover, every state may shape its ROE itself.⁷ Nevertheless, for the purposes of this contribution, the definition put forward by Klappe shall be used as a guide: “Rules of engagement are directives to

port operations, such disclosure may be advantageous, raising public awareness of the tasks and responsibilities of peacekeepers; A short version of the 2003 ROE (the text on a laminated card) distributed to U.S.Army and Marine personnel in Iraq is provided on the webpage of Human Rights Watch: <http://www.hrw.org/reports/2003/usa1203/11.htm#_Toc57442300>.

⁵ The term “rules of engagement” was used for the first time by the US military in the 1950s; the first formal use was in 1958 in the Joint Chiefs of Staff’s (JCS) “Dictionary of military and associated terms” (T. Findlay, *The Use of Force in UN Peace Operations*. Oxford: Oxford University Press, 2002. p. 14 Footnote No. 26).

⁶ P. Dreist, *Rules of Engagement in multinationalen Operationen – ausgewählte Grundsatzfragen*, *NZWehrR*. 2007, 2, pp. 46-60 [47].

⁷ For an overview of the various definitions adopted by NATO, the EU, the UN and various states, cf. P. Dreist, *Rules of Engagement in multinationalen Operationen – ausgewählte Grundsatzfragen*, *NZWehrR*. 2007, 3, pp. 99-115 (106 *et seq.*). For ROE in the context of WEU military operations, see also P. Dreist, *Militärische WEU Operationen und der Umgang der WEU mit Rules of Engagement*, *NZWehrR*. 2009, 1, pp. 1-12 and the continuation in *NZWehrR* 2009, 2, pp. 55 – 66.

operational commanders, which delineate the parameters within which force may be used by designated international peace operations personnel".⁸

Even though arriving at a generally accurate definition is not the purpose of this contribution, one of the aspects of the aforementioned definition needs to be stated more precisely: ROE are being issued and implemented in a wide spectrum of operations, comprising not only cases of international armed conflict but also non-international armed conflicts and an entire spectrum of other types of operations involving the potential use of force, operations described by the summary term of Military Operations Other Than War (MOOTW). This has a decisive impact on their content.⁹ In the case of an international armed conflict, the use of military force is generally allowed; exceptions and certain explicit prohibitions are embodied in international humanitarian law. In MOOTW, the use of military force is allowed only if explicitly authorised by the ROE, observing two important principles – restraint and legitimacy,¹⁰ which means that international legal principles of proportionality, the minimum use of force and the requirement to minimise the potential of collateral damage have to be followed.¹¹

The authorisation for the use of force depends on conditions reflecting the international law parameters of the operation, as stipulated, for example, in the mandate for the operation, or in the agreement with the host country. These parameters evidently define the framework and the scope of ROE and thus have to be distinguished from them.

In addition to the mandate for the operation and the agreements with host states, the Operation Plan and Standard Operating Procedures should also be mentioned as important documents forming the basis of military operations and possibly containing provisions on the use of force as the main aspect of ROE.

The operation's mandate is the legal basis not only for the deployment and actions of forces, but also serves as the legal basis for ROE. While it is desirable that mandates be issued by the UN Security Council, since this is the body that has primary responsibility for the maintenance of international peace and security, mandates established on another international legal basis, e.g. host state content,¹²

⁸ B. F. Klappe, *International Peace Operations*, 2008, op. cit. Footnote No 2, p. 655; compare, e.g. the EU's definition of ROE: "ROE are directives to military commanders and forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or other actions which might be construed as provocative, may, or may not, be applied. ROE are not used to assign tasks or give tactical instructions." (European Union Military Committee: Use of Force Concept for EU-led Military Crisis Management Operations – 1st revision, Part III: Use of Force/H/50), information taken from and definition printed in: Österreichs Bundesheer, Truppendienst, Ausgabe 4/2008.

⁹ P. Dreist, *Rules of Engagement in multinationalen Operationen – ausgewählte Grundsatzfragen*, NZWehrR. 2007, 2, p. 51.

¹⁰ T. Finlay, *The Use of Force in UN Peace Operations*. Oxford: Oxford University Press, 2002. p. 486 [14] (in the following only, T. Finlay, *The Use of Force in UN Peace Operations*).

¹¹ Benn F. Klappe, *International Peace Operations*, 2008, op. cit. Footnote No. 2, p. 659.

¹² Benn F. Klappe, *International Peace Operations*, op. cit. Footnote No. 2, p. 648.

or on the basis of international agreements, are also possible. The mandate should stipulate the general *basic* parameters of the operation: its objectives and purposes; the means to be used to achieve these objectives; furthermore the size, structure and command and control structures of the armed force designated to carry out the operation, etc. In relation to the mandate, ROE are one of its implementing instruments, which derive their authority from the mandate itself and therefore must communicate with its terms, objectives and purposes.¹³

The Operations Plan (OP) and Standard Operating Procedures (SOP) are other documents of importance. By elaborating on the general parameters of the operation set out in the mandate, they lay down the operational rules of an operation, forming its operational framework. The Operations Plan, taking the form of a commander's directive, among other forms, describes the specific actions and operational missions necessary to attain the goals of the operation, and specifies command and control structures, as well as the authority possessed by the various levels of command. Similarly to the OP, under military terminology, SOP provide the practical details of the operation, targeting the unit and subunit levels of the force. SOP compose the concepts, information and directives that are indispensable for the practical functioning of the forces; they also contain basic provisions on the rules of engagement, e.g. defining the "force" and the principles governing its use.¹⁴ As SOP target the force at the sector level, they are not standardized but tend to be flexible, describing the operational procedures of particular, smaller units (such as battalions).

The Status of Forces Agreement or the Status of Mission Agreement (SOFA/SOMA) are documents of a different nature. From a legal point of view, the OP and SOP are intra-organisational acts, while SOFA/SOMA are bilateral or multilateral international agreements concluded between the host state, on the territory of which and with the consent of which the operation takes place, and the states or international organizations deploying the force. Such agreements are of great practical importance as they cover a broad variety of practical material and legal issues as well as issues of day-to-day life. The most important legal issues covered by the SOFA/SOMA are those concerning the immunities and privileges (and thus civil and criminal liability) of the deployed personnel, but also the question of the liability of the states/international organizations deploying the forces.¹⁵ As concerns the use of force, the SOFA/SOMA usually make no reference to this issue.

¹³ Benn F. Klappe, *International Peace Operations*, op. cit. Footnote No. 2, p. 649.

¹⁴ T. Finlay, *The Use of Force in UN Peace Operations*, *infra* at Footnote No. 7, p. 14; Demurenko / Nikitin, *infra* at Footnote No. 6.

¹⁵ For EU practice in this field, compare, e.g.: Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia, OJ L 82, 29. 3. 2003, pp. 46–51, especially Article 13; Agreement between the European Union and the Democratic Republic of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa), OJ L 256, 1. 10. 2005, pp. 58–62, especially Article 14; Agreement between the European Union and

2.2 Legal, military, and policy purposes of ROE

There are several factors that have an impact on shaping the content of ROE: international law (mainly the law of armed conflict), but also the domestic law of the countries sending the troops, as well as operational and political factors.¹⁶ In general, they help to synchronize the political-diplomatic and military components of a strategy by allowing political commanders to better understand, forecast, and tailor the actions of a force.

Looking briefly at the political purpose of ROE, here the intent is simply to ensure the coherence of military actions taken in the course of an operation and to comply with the political parameters of the sending nation or international organization. The military purpose may be easily derived from the ROE definition stated above: ROE stipulate in precise terms the limits on the use of the force which may be used in order to achieve the objectives of the operation. The commander thus has clear guidance, allowing him to tailor the actions of forces in a manner reflecting the operation's parameters, in a manner that therefore ensures that these actions are lawful. As to the legal purpose it is particularly important to note that ROE are not a separate source of legal obligations. Hence they cannot serve to justify unlawful conduct, nor do they expand (and cannot expand) the applicable international law. ROE in fact clarify, emphasize and restrict the relevant legal norms – the commander is given operational guidance on how to accomplish the mission within the constraints of international law. Thus, it can be argued that from the viewpoint of legal purpose, ROE safeguard compliance with international law. To provide examples: the ROE may *reproduce* the interdiction of attacks on certain targets (direct attacks against civilians, etc.) as stipulated in international humanitarian law norms, or *restrict* the competence to order attacks on targets permissible under IHL; ROE may also limit or prohibit (even in cases where this would be proper and permissible under IHL) the use of certain weapons and military tactics; they may also determine the level in the chain of command from which authorization must be sought for the use of certain weapons. Such restrictions which go beyond what is required by the applicable international (and possibly also domestic) norms may be based on extralegal purposes, reflecting, for example, the cultural or other specificities of the operating area. Furthermore, current developments in military missions show that there may be further constraints by specific grants of authority under UN or military agreements. Hence it falls to the ROE to reflect such constraints enshrined in the specific legal frameworks of a particular operation, as stated above.

The legal purpose of ROE is not only to ensure compliance with international law but also to ensure compliance with the domestic law of the troop contributing country.¹⁷ It goes without saying that domestic constitutional and other legal

the Gabonese Republic on the status of the European Union-led forces in the Gabonese Republic, OJ L 187, 8. 7. 2006, pp. 43-48, especially Article 15.

¹⁶ This is not an exclusive list, so further (extralegal) factors could certainly be added.

¹⁷ This question becomes more complicated in cases where multinational troops of international

norms must also be observed and reflected in the ROE. Restrictions deriving from national legal norms or a more restrictive national mandate for a particular operation are possible. Such national self-imposed constraints may be introduced as so-called “caveats”. It should, however, be underlined that even though the national parameters can be more restrictive, they may *not* allow more than the ROE of the multinational force which the state concerned is contributing troops to. One of the positive consequences of such a system is that the deployed soldier has legal certainty that by adhering to the ROE issued for the operation, his conduct is covered by both international as well as national law and is therefore legal.¹⁸ This advantage is not to be underestimated, especially in view of the growing complexity of the missions conducted in recent decades.

3. ROE under debate

ROE deal with aspects of the use of force, which is generally one of the most crucial, sensitive and often also one of the most complicated issues for the international community. As required by international law and the UN Charter, the use of force is normally considered only if all other non-military (diplomatic, political or economic) means have failed to provide relief in a particular crisis situation occurring in the international community. Frequently the decision on whether or not to deploy forces in a particular situation is just as controversial as the question of the means, intensity and amount of force to be used (the crucial aspects included in ROE) in order to achieve the operation’s objectives. Consequently, drafting ROE which correspond with the legal, military and policy parameters set up in a mandate can already be regarded as a daunting undertaking. This is one of the reasons why there cannot be “universal” ROE. Nevertheless, when deciding on the parameters of the use of force for an operation, i.e. when drafting (or making or requesting changes to) the ROE of an operation (or to the operation’s mandate), two aspects must be kept in mind: The ROE must make it possible to protect the force and they must make it possible to achieve the objectives of the operation. Recent developments show that configuring balanced ROE that reflect these two aspects, i.e. a configuration that meets the requirements and objective of the mission, as well as the relevant legal and extralegal constraints, is becoming an ever more challenging task.

3.1 *The changing context of the use of force*

The first issue that this contribution shall draw attention to is the changing context of the use force in the international community following the end of the

organizations are deployed, e.g. when EU troops are deployed as part of a multinational UN peacekeeping force. A plethora of interesting questions arises, e.g. whether compliance with the “domestic” legal norms of the international organization (as a subject under international law separate from its member states) or those of the contributing member state must be ensured in cases where the limitations imposed by the international organization go beyond those of the respective member state.

¹⁸ P. Dreist, *Rules of Engagement in multinationalen Operationen – ausgewählte Grundsatzfragen*, NZWehrR, 2007, 4, pp. 146-151 [146].

Cold War, which led to a significant increase in the number and variety of military operations other than war. A good example is the emergence of the peacekeeping phenomenon and the continual substantive and qualitative changes that this concept has undergone, especially in consequence of the developments of the last two decades, when the UN was hamstrung by its failures in Rwanda, Somalia and Bosnia. As *Klappe* notes in this regard, the changing character of peace operations leads to an increased risk of civilian population casualties, often having as a consequence violent countermeasures against the peacekeepers.¹⁹

In general, a plethora of operation types other than war have occurred, including peacekeeping or peace enforcement operations, international police operations (e.g. for eradicating international criminal groups, combating piracy or illegal arms and drug trade), and less often various types of rescue and humanitarian actions, as well as operations in which the armed forces are used in the aftermath of large-scale disasters.²⁰

The main point to be stressed in this context is that such operations may vary significantly in size, character, objectives, and also with regard to their legal basis. Additionally, a change of mission may become necessary because of a changing political environment or for other reasons. The mechanism which is meant to reflect the parameters and/or the potentially necessary changes to MOOTW within the scope of international and domestic law consists of the ROE. If we take into consideration the complexity of MOOTW together with the politically explosive nature such operations often have, it is not surprising that in such operations the ROE tend to be more restrictive and detailed.

However, complexity is certainly not the sole (and arguably also not the main) reason for drafting more restrictive ROE. It has to be underlined that the primary objective and the overall purpose of MOOTW, i.e. peace support operations, is not to combat the enemy but to achieve/support peace by the means defined in the mandate; the use of force in this context has a completely different goal than that of an operation in the course of armed conflict. It therefore goes without saying that for MOOTW, a strong desire to limit the use of military force is and must be symptomatic - none of the participants in situations other than war want to see the conflict or situation escalate; at the very least because such an escalation could be deemed a violation of international law, since the rules governing the use of force in international relations are more specific.

Prima facie, such detailed and restrictive ROE may appear to be better suited to meeting the variety of political, diplomatic and other requirements that are characteristic of MOOTW. However, the complexity of such ROE may also cause

¹⁹ Benn F. Klappe, *International Peace Operations*, op. cit. Footnote No. 2, p. 655.

²⁰ Cf. A. Demurenko, A. Nikitin, *Basic Terminology and Concepts in International Peacekeeping Operations: An Analytical Review. Low Intensity Conflict and Law Enforcement*, Vol. 6, No. 1, summer 1997, pp. 111-126, available online at: <http://fmso.leavenworth.army.mil/documents/pkterms.htm>; P. Dreist, *Rules of Engagement in multinationalen Operationen – ausgewählte Grundsatzfragen*, *NZWehrR*, 2007, 2, pp. 46-60 [p. 49].

them to be vague and imprecise, which may potentially result in an escalation of the situation. Also, drafting the ROE in too restrictive a manner may have serious negative consequences, as the statement of Lt. Gen. Boonsrang Niumpradit (U.N. military headquarters for East Timor, Dili)²¹ concisely demonstrates: *“In the jungle, we are not too happy about having to shout first, and then we get fired at first. It’s just suicidal.”*²² Furthermore, other situations that are also undesirable are situations where the use of force is necessary and proportionate but the commander/soldier is hesitant to engage and instead attempts to defuse a violent situation.

3.2 Are ROE a hindrance to accomplishing the mission?

As stated above, the developers of ROE must draft them in a manner that makes it possible to protect the force and achieve the objectives of the operation. Although it is desirable to minimize the amount of force authorized (especially in MOOTW, so as not to allow the situation escalate), the ROE must be robust enough to enable the deployed forces to accomplish the mission, i.e. to achieve the policy objectives set out in the mandate and to ensure that the right of self-defence is not compromised. In other words, an absence of appropriate ROE may not only cause a general failure of the operation but may also endanger the deployed forces. In such cases, the Rules of Engagement may effectively constitute a hindrance to accomplishing the mission and a danger to the deployed forces.

The problem of not having sufficiently robust/appropriate ROE has been recognized and criticised by specific, deployed service members,²³ as well as by various members of the international community. As an example of criticism levelled by a state with regard to the alleged weakness of ROE (and also a criticism of the operation’s mandate), the statement of the Permanent Mission of the Republic of the Philippines to the United Nations can be mentioned: *“Lack of strong mandates and robust rules of engagement in hostile environments is hump to the success [note: hampers the success] of PKO. However, robust operations and clear mandates should not be limited to proactive measures to prevent killings and other destructive and violent actions against*

²¹ Force Commander of the Military Component of the Peacekeeping Force of the United Nations Transitional Administration in East Timor. Under UN Security Council Resolution 1272, its mandate includes the provision of security and law and order in East Timor, the coordination of humanitarian assistance and the support of capacity-building for self-government. The Peacekeeping Force encompassing 7700 personnel members from 24 nations was established to perform security functions; for more information on the legal aspects of the International Force for East Timor, see e.g. M. J. Kelly, et al. Legal aspects of Australia’s involvement in the International Force for East Timor. *International Review of the Red Cross*. 2001, 841, pp. 101-139, available online at: <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQZ2>>.

²² U.N. peacekeepers in E. Timor want rules of engagement changed. *Asian Political News* [online]. 11.09.2000, [cit. 2010-05-30], available online at: <http://findarticles.com/p/articles/mi_m0WDQ/is_2000_Sept_11/ai_65731076/>.

²³ Cf. the story introduced at the beginning of this contribution, “Death by rules of engagement”, see *infra* at Footnote 1.

*civilians but should also give due regard to the need for the unhampered implementation of peace-building strategy to help enhance and ensure the success of a mission.”*²⁴

Last but not least, the United Nations is also aware of the issue. The Summary of the Brahimi Report²⁵ states: “*Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission’s mandate. Rules of engagement should be sufficiently robust and not force United Nations contingents to cede the initiative to their attackers.*”

A concrete example of restrictive and consequently inappropriate ROE is provided by the deployment of UNPROFOR in the former Yugoslavia. Even though UNPROFOR’s lack of success (the failure to achieve a full ceasefire and a political solution to the conflict, the failure to assure the protection of “safe areas” such as Srebrenica, Tuzla, Sarajevo, etc.) was certainly also caused by aspects other than the weak ROE only, they certainly contributed in a significant way to the mission’s overall lack of success. For example, the deployed peacekeeping forces were not allowed to use force in situations when they were under a temporary blockade or even when they were taken hostage, i.e. in situations, which could only be resolved through the use of armed force.²⁶ This was, however, not permitted in order to avoid an escalation of violence. At the same time, the Rules of Engagement contained provisions allowing them “to deter attacks against safe areas” and “to promote the withdrawal of attacking force” however, an explicit authorisation to “defend safe areas” and “to ensure or enforce the withdrawal of attacking forces” was not included.²⁷ Such vague wording and lack of robustness of the ROE became one of the reasons for the failure on the part of the Dutch peacekeepers to prevent the Srebrenica massacre on 6 July 1995.

Another example can be seen in the experience of the Czech armed forces deployed as part of KFOR in Kosovo. On March 17 and 18, 2004, violent rioting by ethnic Albanians broke out in Kosovo, resulting in the deaths of 19 civilians, while thousands of Serbs were forced to leave their homes and hundreds of houses and several Orthodox churches were damaged or destroyed.²⁸ At the time of riots, the Czech KFOR squad guarded, among other places, the Serbian Orthodox church

²⁴ Statement of the Permanent Mission of the Republic of the Philippines to the United Nations in the Open Meeting on Peacekeeping Operations Security Council Chamber, 17 May 2004; the full text of the statement is available at: <http://www.un.int/philippines/statements/20040517.html>.

²⁵ United Nations, Report of the Panel on United Nations Peace Operations (Brahimi Report) A/55/305 - S/2000/809, p. 9, available at: http://www.un.org/peace/reports/peace_operations/docs/a_55_305.pdf.

²⁶ P. Arbenz, Möglichkeiten und Grenzen der Blauhelme in Ex-Jugoslawien, in: *Zeitgeschichtliche Hintergründe aktueller Konflikte*, SZ1995, Vol.5, pp. 14-24 (pp. 17 *et seq.*).

²⁷ Österreichs Bundesheer. Rules of Engagement. *Truppendienst*. Ausgabe 4/2008.

²⁸ Kosovo clashes. *BBC News*. Friday, 19 March 2004. Available at: <http://news.bbc.co.uk/2/hi/europe/3551571.stm>; Human Rights Watch. Failure to Protect: Anti-Minority Violence in Kosovo, March 2004. July 2004 Vol. 16 No. 6 (D), p. 68, available online at: <http://www.hrw.org/sites/default/files/reports/kosovo0704.pdf>; as Human Rights Watch notes in this report (pp. 1 *et seq.*), the “*violence across Kosovo represents the most serious setback since 1999 in the international community’s efforts to create a multi-ethnic Kosovo in which both the government and civil society respect human rights.*”

in Podujevo when it was attacked by a crowd of about 500 people. The soldiers had to retreat and the church was destroyed. This was caused by the lack of special riot control gear, as well as by insufficient capacity and training to respond effectively.²⁹ In general, the response by the international force also suffered from national caveats to the rules of engagement, which prevented the deployment of larger numbers of NATO forces in response to the riots.³⁰

To a certain extent this was also true for the Czech KFOR forces, which lacked, under the then applicable national legislation,³¹ namely Act No. 219/1999 Coll., on armed forces of the Czech Republic (*zákon č. 219/1999 Sb., o ozbrojených silách České republiky*), the authorisation to use special riot control gear.³² Czech legislators subsequently listened to the argument that the Czech members of peacekeeping forces were being increasingly charged with accomplishing tasks comparable to those usually carried out by the police, including riot control.³³ Accordingly, reflecting on the Podujevo experience and bearing in mind the necessity to remedy situations occurring in the course of the deployment of Czech soldiers abroad, when the use of armed force is restricted to self-defence and armed forces' members are facing violent riots that need to be responded to by means other than armed force, Czech legislators amended Act No. 219/1999 Coll. The relevant amendment introduced Article 42 a) which provided the legal basis for the use of “non-lethal guns and other means” by Czech armed forces in the course of international operations and other operations.

3.3 ROE and national legal parameters

Within the framework of an examination of the last issue of the current debates relating to ROE, this paper will outline the interdependence between national (legal) parameters and the drafting and practical application of ROE. The implications of this relationship shall be demonstrated on the example of Germany's participation in the current operations in Afghanistan.

It is publicly known that many states which have assigned their military forces to ISAF (Afghanistan),³⁴ also imposed a broad variety of limitations and constraints

²⁹ V. Marek, *Soldiers with law enforcement training*, *Armed Forces Review*, 2009, 1, pp. 36-39. Available at: <http://www.army.cz/assets/assets/multimedia-a-knihovna/casopisy/czech-army/CzechArmy_1_pdf/czecharmy_1.pdf>.

³⁰ The national caveats in some cases prohibited crowd control or deployment outside a predefined area; cf. Serwer, Daniel, *Kosovo: Status with Standards*. United States Institute of Peace, April 2004, available online at: <http://www.usip.org/resources/kosovo-status-standards>.

³¹ For an analysis of the legal and other aspects of Czech participation in UN peacekeeping operations, see, for example: O. Bureš, L. Dušková, *Čeští vojáci a operace na udržení míru OSN, Obrana a strategie*. 2007, 2, s. 53-70.

³² As defined in Article 42a) of Act No. 219/1999 Coll., on armed forces of the Czech Republic.

³³ Sněmovní tisk 1072/0, část č. 1/3, *Novela z. o ozbrojených silách České republiky*, 20 July 2005, available at: <<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=1072&CT1=0>>.

³⁴ ISAF is mandated under Chapter VII of the United Nations Charter (Peace Enforcing) by UN Security Council Resolutions 1386, 1413, 1444, 1510, 1563, 1623, 1659 and 1707, and exists in accordance with the Bonn Agreement of 6 Dec. 2001. ISAF's primary task is to support the Afghan Government

on their forces (national caveats), e.g. reportedly not allowing them to engage in combat operations, or not allowing them to serve in parts of Afghanistan which are considered to be more hostile (the southern areas of Afghanistan).³⁵ Nevertheless, in the light of the changing situation in Afghanistan, NATO announced in 2005 the introduction of new, more robust ROE, ones that reportedly also permitted pre-emptive military strikes against perceived security threats.³⁶

Similarly, the German armed forces introduced in 2009 a new soldier's ROE card, which expanded the types of situations in which armed force may be used and permitted, *inter alia*, pre-emptive military strikes against perceived security threats.³⁷ The content of the German ROE-card thus became more "robust". However, it was precisely this point that became the subject of controversy in Germany, as the question arose whether such situations of pre-emptive use of force were covered by the national mandate from the *Bundestag*, and mainly whether they were covered by the applicable provisions of the German constitution, the *Grundgesetz*. The *Grundgesetz* explicitly prohibits a war of aggression (Article 26 GG). Whether the situation in Afghanistan can be classified as "war" remains debatable. Nevertheless, German officials invented for this situation the term „*kriegsähnliche Zustände*“ ("war-like situation").

This controversy demonstrates, *inter alia*, the importance of including an authorisation for the appropriate amount and intensity of military force so the deployed troops can adapt to a changing situation and fulfil the assigned tasks. However, the foregoing also shows the difficulties that a state may face when trying to change the ROE in this manner.

4. Conclusions

The framework for war operations and military operations other than war comprises a variety of legal and extralegal parameters relating to the delicate issue of the use of force. The mechanism by means of which these parameters are implemented consists of the ROE. This contribution attempted to provide, as the first step, a brief introduction to the general concept of ROE by first defining the concept and then describing its scope and purpose. Such an approach was necessary in order to make it possible to then address the primary focus of the contribution, i.e., to demonstrate current developments as concerns the ROE issue on three aspects which currently make ROE the subject of public scrutiny and discussion.

in its country rebuilding efforts by providing and maintaining a secure environment. ISAF's area of operations covers the whole of Afghanistan. See <<http://www.nato.int/ISAF/>>.

³⁵ This is the case of Germany, see Merz, Sebastian, *Still on the way to Afghanistan? Germany and its forces in the Hindu Kush*, A SIPRI Project Paper, November 2007, p. 15 [8], available online at: <<http://www.sipri.org/research/conflict/publications/merz>>.

³⁶ Cf. Radio Free Europe/Radio Liberty, Afghanistan: NATO Troops Apply 'Robust' New Rules Of Engagement, 7 February 2006, available at: <<http://www.rferl.org/content/article/1065518.html>>.

³⁷ See the press conference of the German Federal Government of 14 December 2009: Regierungspressekonferenz vom 14. 12. 2009, available at: <http://www.bundesregierung.de/nn_1516/Content/DE/Mitschrift/Pressekonferenzen/2009/12/2009-12-14-regpk.html>.

As has been shown, the last few decades have seen continuous growth in the variety of military operations, especially those other than war. During the implementation of operations other than war, such as peacekeeping operations, it is crucial to, *inter alia*, limit the use of force to a minimum and to take into account a broad variety of extralegal aspects. This change must necessarily also be reflected in Rules of Engagement, even though one of the possible negative consequences of such change is that the ROE may become complex and vague. The second currently debated issue, closely linked to the previous discussed aspect, concerns the difficulty of developing and designing Rules of Engagement that are compatible with the mission objectives and parameters. The conclusion that can be drawn from specific examples of UNPROFOR's and KFOR's experience is that ROE must be drafted in a way which will not only ensure compliance with the international legal principles of proportionality and the minimum use of force, but which will at the same time not compromise the right of self-defence and will allow authorisation of the intensity and amount of force necessary to accomplish the tasks assigned to the mission. Consequently, Rules of Engagement can either end up becoming the subject of controversy because of an inappropriate use of force or they may end up being criticised for being weak (insufficiently robust) or too restrictive. Cases where the relevant ROE have proved to be insufficiently robust have occurred often in recent decades and have led to very undesirable consequences for the international community (as shown on the example of the UNPROFOR Rules of Engagement that contributed to the Srebrenica massacre). The third issue examined in this contribution was the interdependence between national parameters and ROE, and the difficulties that can arise from this relationship were pointed out. The example of Germany was used to show that states now recognize the importance of including authorisation for the appropriate amount and intensity of military force into Rules of Engagement. Germany decided to make its Rules of Engagement more robust in order to adapt to the reality of the situation in Afghanistan. However, it has also been shown that making such changes to ROE, even in cases where it is necessary to do so, may become problematic because of certain restrictions in national legal norms, in Germany's case such restrictions consisted of special provisions in the country's Constitution.

In general, this contribution has endeavoured to not only show the importance of ROE but to also underline how challenging it is for rule-designers, as well as users, to design, implement and use rules of engagement which will reflect all necessary specific parameters of the relevant operation. Finally, the contribution pointed out that Rules of Engagement constitute an issue that deserves attention and discussion not only among journalists and the public, but also in academia and in the military.